In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE UNITED STATES, APPELLANT,
v.
THE OFFICERS AND CREW OF THE U. S. S. "Mangrove." } No. 24.

THE OFFICERS AND ENLISTED MEN OF THE U. S. S. "New York" and others, appellants,
v.
THE OFFICERS AND CREW OF THE U. S. S. "Mangrove." } No. 34.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

MOTION TO PASS THE CASES.

Now comes the United States and shows the court that under an order of court, entered on the 15th day of April, 1901, the parties to the above causes have procured and are still procuring further proofs. Depositions of certain witnesses already given have not yet been filed in court and certain other depositions still remain to be taken on written interrogatories and cross-interrogatories, which have been duly forwarded to the commissioners.

Wherefore, the United States moves the court to pass the cases pending the filing of depositions, which are now being procured.

J. K. RICHARDS,
Solicitor-General.

We join in the foregoing motion.

McCAMMON & HAYDEN,
Of Counsel for the officers and men of the U. S. flagship New York.

GEO. A. and WM. B. KING,
Of Counsel for the officers and men of the U. S. S. Indiana and Wilmington.

HERBERT & MICOU,
Of Counsel for the officers and men of the U. S. S. Mangrove.

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IN THE

Supreme Court of the United States.

THE UNITED STATES, Appellant, v. THE OFFICERS AND CREW OF THE U. S. S. *Mangrove*.	No. 380.
THE OFFICERS AND CREW OF THE U. S. S. *New York*, THE U. S. S. *Indiana* AND THE U. S. S. *Wilmington*, Appellants, v. THE OFFICERS AND CREW OF THE U. S. S. *Mangrove*.	No. 433.

I. MOTION FOR LEAVE TO TAKE FURTHER PROOF.

Now comes Henry C. Taylor, Rear-Admiral in the United States Navy and commanding officer of the United States Battleship *Indiana* on April 25, 1898, when the Spanish steamship *Panama* was captured, the proceeds whereof are in question in the above-entitled causes, and prays this court, on behalf of the officers and crew of the U. S. S. *Indiana*, for leave to take further proof in regard to the relative position of the said vessel of the U. S. S. *Mangrove* and the Spanish steamer *Panama* at the time of the capture of the *Panama*, in order to show that the *Indiana* was within signal distance of the U. S. S. *Mangrove* when said capture took place.

For cause for this motion he respectfully refers to the affidavits of himself and others herewith presented and to

the considerations set forth in the brief and argument of counsel filed herein.

GEORGE A. & WILLIAM B. KING,
Proctors for Rear-Admiral Henry C. Taylor, commanding officer, and the other officers and crew of the U. S. S. Indiana.

II. AFFIDAVITS SUPPORTING THE MOTION.

IN THE SUPREME COURT OF THE UNITED STATES.

THE UNITED STATES, Appellant,
v.
THE OFFICERS AND CREW OF THE U. S. S. *Mangrove.* } No. 380.

THE OFFICERS AND CREW OF THE U. S. S. *New York*, THE U. S. S. *Indiana* AND THE U. S. S. *Wilmington*, Appellants,
v.
THE OFFICERS AND CREW OF THE U. S. S. *Mangrove.* } No. 433.

Affidavit of Henry C. Taylor, Captain U. S. N.

STATE OF NEW YORK, }
County of Kings, } *ss:*

Henry C. Taylor, being duly sworn, deposes and says:

That he is captain in the United States Navy and, during the war with Spain, commanded the United States battleship *Indiana;* that he was in command of said vessel at the date of the capture of the Spanish steamer *Panama*, April 25, 1898, and made claim in accordance with the law for a share in the prize money

due on account of said capture, on behalf of himself and the officers and men of his vessel.

That, after the date of said capture, he was very closely occupied with his professional duties in command of said steamer, beginning with the blockade of Havana, followed by the expedition to Porto Rico and afterward acting in command of the convoy of the army transports from Tampa, Florida, to Cuba, and later taking part in the blockade of Santiago, the battle of July 3d, and the subsequent events in that vicinity. That these engagements in line of duty necessarily took up his time and attention completely and, on this account, he gave little or no consideration to the protection of the interests of the *Indiana* in the capture of the *Panama*, beyond sending in a report to the District Attorney and the Prize Court. That he did not, at the time, suppose that there was any question in regard to the right of the *Indiana* to share in the proceeds of this capture and he believed that his interests would be amply protected by the steps which he had taken and through the action of the United States District Attorney. That, for these reasons, he did not volunteer his testimony nor did he take any care that further testimony was produced aside from the depositions of Chaplain Cassard, Lieutenant Decker and Lieutenant Dawson, sworn to before him on the 30th day of May, 1898, and of Chief Yeoman Murray, sworn to before him on the 30th day of June, 1898.

That, when he was on shore at Key West, he was unable to give any time to the investigation of this matter further than that, on one occasion, he met some one connected with the administration of justice on the steps of the Custom House and asked what should be done in regard to the *Panama* and was by him told that all those things would be arranged and due notice given.

That, at the time of the chase and capture of the

Panama by the *Mangrove*, the *Indiana* was in sight and in signal distance of both vessels and he observed the chase and the capture from the *Indiana*. That, when the *Mangrove* fired a gun and the *Panama* hove to, he distinctly saw smoke shoot out from the gun and saw it so clearly that he observed the direction of it moving from the mouth of the gun. That afterward, when the *Mangrove* dispatched a boat to the *Panama*, he saw said boat in the water moving between the two vessels.

That it was the usual rule in the Civil War that the capture was considered complete when a line was thrown from the captured vessel for the purpose of taking an officer on board or of taking prize in tow. That, while he was within signal distance when the *Mangrove* fired this first gun and when the *Panama* hove to, the *Indiana* was directly approaching the other vessels at this time and, when the boat from the *Mangrove* reached the *Panama*, the *Indiana* was considerable nearer. We could, at this time, have readily seen any signals hoisted by the *Mangrove*.

That, when the guns from the *Mangrove* were fired, he thinks that he was from three to five miles distant. It was light enough at that time to have used the ordinary day signals, and he is fully satisfied that, from the position in which he then stood, he could have read a signal calling for assistance from the *Mangrove* had such been hoisted. That he refers to the ordinary mode of signalling employed in the Navy, by means of flags.

That the failure to see the colors of the *Panama* at 5.55 was rather natural, as the flag was blowing out but very little and the National ensigns used on board ships are generally more or less discolored by smoke and dirt from the ship and long and frequent exposure to the wind and weather, whereas the signal flags are purposely kept clean and bright and may therefore in many instances

be read off with ease, when the ensign at the staff, especially if not blowing out, may be difficult to make out with certainty.

That he did not notice the *New York's* position when the boat from the *Mangrove* was dispatched to the *Panama*, but the *New York* was within easy signal distance of the *Indiana* a short time before. HENRY C. TAYLOR,
Captain U. S. Navy.

Sworn to and subscribed before me this 5th day of February, 1901. MARTHA M. BECK,
[SEAL] *Notary Public.*

IN THE SUPREME COURT OF THE UNITED STATES.

THE UNITED STATES, APPELLANT,
v.
THE OFFICERS AND CREW OF THE U. S. S. *Mangrove.* } No. 380.

THE OFFICERS AND CREW OF THE U. S. S. *New York*, THE U. S. S. *Indiana* AND THE U. S. S. *Wilmington*, Appellants,
v.
THE OFFICERS AND CREW OF THE U. S. S. *Mangrove.* } No. 433.

Affidavit of William G. Cassard, Chaplain, U. S. N.

DISTRICT OF COLUMBIA, *ss:*

William G. Cassard, being duly sworn, deposes and says that he is a chaplain in the United States Navy, and has heretofore testified in the case of the United States *v.* the Spanish steamer *Panama*, in prize, his deposition being

printed on pp. 38 and 39 of the record in the above-entitled causes.

That he has examined the deposition of Apothecary W. W. Ralston, printed on pp. 24 and 25 of the record aforesaid, stating that this affiant remarked to him later that the *Indiana* was out of signal distance and would not share in the prize and this affiant denies absolutely having made any such remark.

That the facts in regard to the presence of the *Indiana* at the time of the capture of the *Panama* are correctly stated in his deposition hereinbefore referred to and he at no time said that the *Indiana* was out of signal distance or that the *Indiana* would not or was not entitled to share in the prize.

That, at the time when the report to the commanding officer that the *Indiana* was coming up, was made as detailed by this affiant in his former deposition as printed on p. 39 of the record aforesaid, he was standing on the upper or superstructure deck of the *Mangrove*, in close proximity to the bridge, in company with Yeoman Murry and a few feet away from Lieut.-Comdr. W. H. Everett and Naval Cadet L. C. Palmer; that he distinctly heard the mate, referred to in said deposition, report that the *Indiana* was coming up. Lieut.-Comdr. Everett and Cadet Palmer were close together at the time, and the report made by the mate was repeated by Naval Cadet Palmer to Lieut.-Comdr. Everett, both the mate and Palmer indicating the direction of the *Indiana*. That, at the time, this affiant recognized the vessel in that direction as the *Indiana* by her shape and outline, clearly discernible with the naked eye. That the identity of the *Indiana* was clearly discernible, the distance being from 3 to 4 miles, as heretofore stated in his aforesaid deposition. That, when this report was made to Lieut.-Comdr. Everett, he did not look in the direction indicated but

said to Cadet Palmer that it could not be the *Indiana* because that was not the direction in which the *Indiana* should be looked for. That, both at this time and at other times during the presence of this affiant on board the U. S. S. *Mangrove*, on the trip from the *Indiana* to Key West, this affiant observed that the eyesight of said Lieut.-Comdr. Everett was very imperfect, it being particularly noticed by this affiant that facts in regard to the compass reading and in relation to night signals when, subsequently, other vessels of the fleet were met, were reported to said Everett by others when the facts were of such a nature and such conditions existed that said facts would naturally have been seen by a person possessing good eyesight and not have required report. That the questions put by said Lieut.-Comdr. Everett in regard to such compass reading and signals, indicated that he could not see them himself but had to depend on others. That, on that same evening, said Lieut.-Comdr. Everett stated to this affiant that his eyesight was bad and troubled him very much.

WILLIAM G. CASSARD.

Sworn to and subscribed before me this 22d day of January, 1901. MARTHA M. BECK.

[SEAL.] *Notary Public.*

IN THE SUPREME COURT OF THE UNITED STATES.

THE UNITED STATES, Appellant,
v.
THE OFFICERS AND CREW OF THE U. S. S. *Mangrove.* } No. 380.

THE OFFICERS AND CREW OF THE U. S. S. *New York*, THE U. S. S. *Indiana* AND THE U. S. S. *Wilmington*, Appellants,
v.
THE OFFICERS AND CREW OF THE U. S. S. *Mangrove.* } No. 433.

Affidavit of George L. Mallery, Gunner, U. S. N.

STATE OF NEW YORK, *County of Kings,* } *ss.:*

George L. Mallery, being duly sworn, deposes and says:

That he is a gunner in the United States Navy. That, on the 25th day of May, 1898, he was serving on the U. S. S. *Indiana* as a gunner and was on the said vessel when the *Panama* was captured.

That, during the early part of the chase of the *Panama*, he was below deck; that he came on deck in time to see and distinctly saw the smoke of the gun fired from the U. S. S. *Mangrove* in the direction of the *Panama*. That, when the *Panama* hove to after the firing of this gun, he distinctly saw the boat going from the *Mangrove* to the *Panama*, said boat being in the water between the two vessels at the time. That he saw these things through a glass from the deck of the *Indiana*.

That, during the whole time, from the time he came on deck until the hauling down of the colors of the *Panama*, the *Indiana* was within signal distance of the *Mangrove*, meaning by signal distance that the *Indiana* and

the *Mangrove* could have communicated readily by ordinary methods of signalling, that is, until it became too dark, by ordinary day signals and, after it became too dark for day signals, by lights. That, at no time after his coming on deck as aforesaid, was the distance between the *Mangrove* and *Indiana* such, or the circumstances of atmosphere or other conditions of such a nature that the *Mangrove* could not have readily signalled to the *Indiana* to come to her aid if the *Mangrove* had so desired, and the *Indiana* would have understood such signals.

That the *Panama* did not haul down her colors until a shot had been fired across her bows by the *Indiana*.

G. L. MALLERY,
Gunner, U. S. N.

Witness: FRANK MARBLE,
Lieut. U. S. N.

Sworn to and subscribed before me this 2d day of February, 1901.
THOMAS G. McDONOUGH,
[SEAL] *Notary Public.*

III. BRIEF IN SUPPORT OF MOTION.

IN THE SUPREME COURT OF THE UNITED STATES.

THE UNITED STATES, Appellant,
v.
THE OFFICERS AND CREW OF THE U. S. S. *Mangrove*. } No. 380.

THE OFFICERS AND CREW OF THE U. S. S. *New York*, THE U. S. S. *Indiana* AND THE U. S. S. *Wilmington*, Appellants,
v.
THE OFFICERS AND CREW OF THE U. S. S. *Mangrove*. } No. 433.

Brief in Support of the Motion of Rear-Admiral Henry C. Taylor, Commanding the U. S. S. *Indiana*, for Leave to Take Further Proof in Relation to the Right of said Vessel to Share in the Prize.

In the case of *The Panama*, 176 U. S. 535, this court held that the vessel named was prize of war. The question now comes up on the conflicting claims of captors to share in the proceeds of the prize.

Statement of Case.

On the hearing below of those claiming to be entitled to share as captors, claims were filed under Revised Statutes §§ 4614 and 4632, on behalf of the U. S. S. *Mangrove* (Rec. 19), the U. S. S. *Indiana* (Rec. 35), the U. S. S. *Wilmington* (Rec. 44) and the U. S. S. *New York* (Rec. 48).

Depositions in support of these claims were taken upon standing interrogatories especially framed to be answered by parties claiming to share in the distribution of prize money (Rec. 21). On behalf of the *Mangrove*, depositions were taken of the commanding officer (Rec. 30) and ten other witnesses (Rec. 22–34); on behalf of the *Indiana*, those of three subordinate officers (Rec. 38–41) and one of the crew (Rec. 42); on behalf of the *Wilmington*, those of the commanding officer (Rec. 45) and two subordinate officers (Rec. 45); and on behalf of the *New York*, those of two subordinate officers (Rec. 51, 69).

The right of a vessel to share in the distribution of prize money is governed by § 4632 of the Revised Statutes as follows:

"All vessels of the Navy within signal-distance of the vessel or vessels making the capture, under such circumstances and in such condition as to be able to render effective aid, if required, shall share in the prize; * * *"

The issue involved between the different vessels claiming is whether they were "within signal distance of the vessel making the capture." The learned District Judge, in deciding this case, correctly states the nature of this issue as follows (Rec. 53):

"Under our prize law the determination of what vessels are entitled to share in prize money for a capture becomes simply a question of fact. The statute is binding upon the courts, and declares positively that those vessels within signal distance and so situated that they can render assistance if required shall share."

In this case, the facts conceded are that the *Mangrove* was the direct instrument in effecting the capture. The other three vessels claim to be entitled to share as within signal distance. The *Indiana* objects that the facts in regard to their participation are not sufficiently shown by the proofs already taken and asks for leave to take further proof. The *New York* makes a similar motion.

Is the Motion Admissible?

Before discussing the facts of the capture, the preliminary question whether such a motion can be made in this court must be answered. The precedents in this court enable this question to be readily answered in favor of the moving parties, and are so clear that it is quite unnecessary to consider decisions elsewhere.

The first case is that of *The Frances*, 8 Cr. 348. A part of the property was condemned because it was found by the court below to be owned by three brothers, trading as a firm, all naturalized citizens of the United States, of whom one lived in Great Britain and two in the United States. The foreign residence of one of the owners authorized condemnation of his share; the remainder was released. One of the brothers resident in the United

States claimed that the property belonged to him alone and was consequently all exempt. The case was first heard in the District Court and a decree made upon the papers *in preparatorio*. On appeal to the Circuit Court, further proof was directed. Testimony was given by the claimant and eight witnesses in great detail, but the affidavits were not accompanied by certain letters referred to. The court decided that these letters were absolutely essential, saying (p. 353) per Marshall, C. J.: "It is impossible not to perceive their necessity." Notwithstanding that the necessity of producing these letters should have been apparent to the claimant, the court ordered the case to stand "for the production of such further evidence as may place the transaction beyond any doubt." The case illustrates the liberality exercised in permitting the production of evidence designed to clear up controverted questions. It is a broad exercise of power with a view to a final decision upon full consideration of all possible evidence.

A second case on the same vessel, *The Frances*, 8 Cr. 354, presented the case of a conditional consignment, the consignee being permitted to accept or decline the consignment. The nature of the consignment was duly discussed and the court said that the property remained in the consignor and was subject to condemnation, he being a British subject, and that the sentence of condemnation was warranted by the evidence in the court below. The claimants prayed an order for further proof on the ground that the previous acts of the parties, as to similar consignments, had been such as to make this consignment an absolute vesting of the property in the hands of the consignees, American residents. The application, although opposed on the ground that the facts, if proved, would not constitute a legal defence, was granted by the court, and further proof authorized, the court "reserving

any opinion on the law of the case." Yet all the evidence which could be produced under this order must have been available below, had the claimant seen fit to produce it.

In the case of *The Schooner Adeline*, 9 Cr. 244, claims were made by a large number of persons interested in the cargo. The issue was the national character of the owners. Where the owners were French subjects, condemnation was decreed; where American, the goods were released on payment of salvage. The national character was established on the part of twenty-six American and six Frenchmen. The national character not being clear as to the remaining claimants, they were permitted to take further proof. Attention is called here to the fact that thirty-two claimants had foreseen the necessity of establishing national character; the others had, either through ignorance or design, refrained from proving national character, although the need should have been as apparent to them as to the other thirty-two; yet this was not treated as a matter for which they should be held to strict responsibility. They were permitted, after a decision on the law had pointed out the important facts, to present their evidence in this court.

In the case of *The George* and other vessels, 1 Wh. 408, the question was one of collusive capture, many suspicious circumstances being found in the testimony *in preparatorio*. In one of the three cases heard together further proof was allowed in the District Court; in the other two, it was denied. Application was made in all the cases for further proof in the Circuit Court and refused; the application was renewed in the Supreme Court. The Supreme Court, through Chief Justice Marshall, stated the importance of prompt decision where the controversy in prize cases is the question of prize or no prize, but adds (p. 410):

"When the question of prize or no prize is decided in the affirmative, the strong motives for an immediate sentence lose somewhat of their force, and the point to which the testimony *in preparatorio* is taken, is no longer the question in controversy. If another question arises, for instance, as to the proportions in which the owners and crew of the capturing vessel are entitled, the testimony which will decide this question must be searched for, not among the papers of the prize vessel, or the depositions of her crew, but elsewhere, and liberty must, therefore, be given to adduce this testimony. The case of a joint capture has been mentioned, and, we think, correctly, as an analogous case. Where several cruisers claim a share of the prize, extrinsic testimony is admitted to establish their rights."

Upon the question of the application for further proof, the court uses this language (p. 411):

"Under these impressions, the case must be a strong one, indeed; the collusiveness of the capture must be almost confessed before the court could think a refusal to allow other proof than is furnished by the captured vessel justifiable. In the cases before the court there are certainly many circumstances of great suspicion, but none which do not admit of explanation."

The circumstances of suspicion are then carefully enumerated and separately considered, and the court closes the opinion by saying (p. 414):

"Each case depends, in some degree, on the points which have been suggested. They are stated for the purpose of showing that points, on which the judgment of the court may, in some degree, depend, are susceptible of explanation, and, therefore, ought to be explained so far as it may be in the power of the parties to explain them. It is not, however, intended to confine them to the particular points which have been stated. Full liberty is given to both parties to adduce further proof on every point in the case."

This case illustrates the extreme to which this court has gone in its effort to be certain that all possible explanation has been adduced in prize cases.

The London Packet, 2 Wh. 371, is a case in which further proof was ordered in this court, to be taken under a commission. The facts do not appear.

In *The Atalanta*, 3 Wh. 409, the cargo was condemned in the District Court as enemy's property. On appeal to the Circuit Court, further proof was directed, and restitution decreed. The claim was made by a French merchant that the cargo was neutral, carried in an enemy's vessel. Although further proof had been allowed below, the claimant, who had then submitted no testimony but his own in support of his claim, was permitted to produce further proof upon points mentioned by the court, requiring explanation.

The Experiment, 8 Wh. 261, was a case of collusive capture alleged by the United States. Further proof was allowed in this court and the claim was adjudicated upon the original evidence and the further proof produced in this court.

The Sally Magee, 3 Wall. 451, is a case in which ample opportunity for producing full evidence had been given and where the failure to produce evidence was such that the court said (p. 458):

"We can draw but one inference from these facts. It is, that if the evidence were produced, it would be fatal to the claim."

Further proof was not asked for, the appellant insisting that the decree below should be reversed because further proof had not been ordered *sua sponte* by the court below. The court discussed the practice in regard to further proof, although no decision on this point was called for, in the absence of a motion to this end, saying *obiter* (p. 458):

"'Cases of prize are usually heard, in the first instance, upon the papers found on board the vessel, and the examinations taken *in preparatoria;* and it is in the discretion of the court thereupon to make or not to make the order. But the claimant may move for the order, and show the grounds of the application by affidavit, or otherwise, at any time before the final decree is rendered. Such an order may also be made in this court. In one case affidavits were submitted in support of the application, and the order was made after the cause was heard. In another case a parole statement was submitted by the counsel for the claimant before the hearing, and the consequences were the same. The result is always in the discretion of the court, and that discretion is controlled by the circumstances of each case. The order is made with great caution, because of the temptation it holds out to fraud and perjury. It is made only when the interests of justice clearly require it. In the case before us no application was made in the court below, and none in this court."

These positive conclusions are to be drawn from these cases:

(1) That it must be made to appear that the interests of justice require further proof.

(2) That, when it so appears, the court will be liberal in granting an opportunity for further proof.

(3) That further proof is especially to be granted where it is likely to clear up circumstances not adequately explained upon the record before the court.

The Facts of This Case.

Having thus analyzed all the cases reported in this court on this subject, for the ascertainment of the principles to govern this application, the record in this case will now be taken up, together with the additional evidence in hand, with a view to showing that the facts bring this case clearly within the rules announced by this court.

In order to determine whether further proof on points set forth in the affidavits will be of substantial aid to the determination of the case, it is necessary to consider the evidence now in the record and the finding of the District Judge. The evidence divides itself into three classes: that of persons (*a*) on the prize, (*b*) on the *Mangrove* and (*c*) on the *Indiana*.

(*a*) Of the witnesses on the prize, three mention the presence of other vessels than the *Mangrove*, and one was not interrogated on this point. Ramon Burgas, supercargo, says (p. 7) that, at the time of the capture, there were two warships in the distance of which he could see the towers and that they afterward found that these were the *Indiana* and the *Wilmington*. Manuel Quevedo, master, says (p. 14) that there were two ships in sight at the time of the capture, afterward found to be the *Indiana* and the *Wilmington;* Gaspar Thompson, chief engineer, believes (p. 10) that the *Indiana* and another ship were in sight, but he is not positive as to the time as his duties were below. This is all the testimony from the prize. It must be remembered that the interrogatories administered to these witnesses were not addressed at all to the question who were the captors, but were upon the issue of prize or no prize.

(*b*) There are two classes of witnesses from the *Mangrove*, (1) the officers and crew of the *Mangrove* and (2) two persons belonging to the *Indiana* on board as passengers. Their testimony is directly opposed.

The commanding officer of the *Mangrove*, Lieutenant-Commander Everett, says (p. 32) that "at the time of the capture of the *Panama* by the *Mangrove* there were no vessels of the Navy in sight or within signal distance." Naval Cadet L. C. Palmer says (p. 33) that, at the time of the capture of the *Panama*, there were no vessels of the Navy within signal distance; he saw the smoke of a

vessel which he took to be the *Indiana;* he ordered three of the crew to look with their glasses for other vessels; they reported that there was no other vessel in sight and, on looking himself, he saw smoke which he took to be the smoke of the *Indiana.* Mate Cosgrove testifies (p. 35) that Cadet Palmer asked him to look around the horizon with the telescope, which he did, but all he could see was some smoke in the direction of the *Indiana.* Apothecary Ralston testifies (p. 25) to the same effect, as does Mate Peterson (pp. 25, 26). Quartermaster Olssen says (p. 22) that no vessel was within signal distance and that the horizon was clear, except a smoke in the southward and westward. Boatswain's Mate Chipchase says (p. 23) that no vessels were within signal distance and nothing was in sight save smoke to the southward and westward. Coxswain Hansen says (p. 26) that no vessel was in signal distance, only a smoke in the direction of the *Indiana.* Ordinary Seaman Schmitt says (p. 30) that no vessel was in signal distance, that he saw smoke in the direction of the *Indiana,* but no vessel in sight. Gunner's Mate Clinton says (p. 27) that there was no vessel near enough to have made any Navy code signals that they could have understood. Interrogatory 10 is in the following words: "Please state any other facts within your knowledge which you have not yet stated, tending to show what vessels of the Navy were, or were not, within signal distance of the vessel or vessels making the prize?" This is the interrogatory which produced from the witnesses already quoted, the statement that the smoke of the *Indiana* was visible. The last witness, Clinton, answers it with the statement: "Don't apply." Ensign Dayton, answering the 4th interrogatory as to what vessel of the Navy was within signal distance, says (p. 29):

"There was no vessels within signal distance at the time of the capture. By 'within signal distance' I mean

that distance within which any day signals now in use can be read."

He answers the 10th interrogatory by saying, "I have no more facts to state." These answers do not give an impression of complete frankness.

There were on board the *Mangrove* as passengers the chaplain and a chief yeoman of the *Indiana*. Chaplain William G. Cassard says (p. 39) that during the chase of the *Mangrove* he saw the *Indiana* coming rapidly toward them; that the *Indiana* was within signal distance at the time of the capture, three or four miles away, and could have rendered effective aid; that she was within signal distance during the chase and capture from beginning to end, the distance permitting the discernment of signals either visual or sound.

Chief Yeoman Charles E. Murry, attached to the *Indiana*, was aboard the *Mangrove* as a passenger bound for Key West. He says (p. 43) that the *Indiana* was coming up astern during the chase; that he himself loaded the last gun fired by the *Mangrove*; that the *Indiana* was within signal distance at all times during the chase from the time the prize was first sighted until captured; that the ordinary day signals by flags or wigwags could be read by glass from the *Mangrove*.

(c) Lieut. Benton C. Decker, watch officer on the *Indiana*, says (p. 40) that the *Panama* was sighted about 5.15 P. M.; that they headed for her about 6 P. M.; that the *Mangrove* was within easy signal distance when the prize was first sighted; that the chase was within range of the *Indiana's* guns, and that when the prize was boarded the *Indiana* was within signal distance so that shapes or sounds could be distinguished.

First Lieut. William C. Dawson, U. S. M. C., was acting as signal officer on the *Indiana* and says (p. 41) that

the *Panama* when first sighted was six or seven miles away and approached nearer, Pilot Munson on the bridge with him remarking that the vessel looked to him like the *Panama;* that the *Mangrove* was within signal distance of the *Indiana* from about 5.10 P. M. until they came up to the *Panama,* and was in signal distance when the prize was first sighted, signal distance meaning either flag or electric signal, as it might be light or dark; that the prize from the time she was sighted was within easy range of the guns of the *Indiana.*

Direct Contradictions.

Attention is now called to some of the serious contradictions appearing in this testimony.

(1) Lieut.-Commander Everett says (p. 32) positively that no vessels of the Navy were in sight at the time of the capture. Others of the *Mangrove* make the same statement. They are contradicted by the direct testimony of Burgas (p. 7) and Quevedo (p. 14), who were on the prize; by Chaplain Cassard (p. 39) and Chief Yeoman Murry (p. 43), who were on the *Mangrove,* and by Lieutenants Decker (p. 40) and Dawson (p. 41), who were on the *Indiana.*

(2) Chaplain Cassard testifies (p. 39) positively that the *Indiana* was in signal distance at the time of the capture. Apothecary Ralston says (p. 25) that Chaplain Cassard told him after the capture that the *Indiana* was out of signal distance and would not share in the prize.

Chief Yeoman Murry says (p. 43) that the *Indiana* was in signal distance, and Mate Cosgrove says (p. 35) that Chief Yeoman Murry remarked to him after the chase that the *Indiana* was out of signal distance and would not share in the prize.

(4) Chaplain Cassard says (p. 39) that the mate aboard the *Mangrove* reported to the commanding officer that the *Indiana* was coming up. Lieut.-Commander Everett

says (p. 32) that he has set forth fully all the facts in his knowledge tending to show what vessels of the Navy were in signal distance, but he fails to mention this report.

The Reasoning of the Court Below.

The learned District Judge recognized the extremely unsatisfactory nature of this record in the following statement (p. 57):

"The statements of some of these witnesses in regard to time and distance are so utterly inconsistent with what is positively shown to have been the facts of the case, that confidence is shaken in them, but in such a positive contradiction of statements and conflict of testimony it seems to be demanded, if possible, that the circumstances be examined and the testimony reconciled if possible, or at least a reason for the discrepancy sought. To declare that the witnesses of either side have wilfully testified falsely is not a satisfactory conclusion, especially when the character and official standing of many of them is considered, yet such conclusion must be reached unless some explanation of the discrepancy is found."

His conclusion is that the *Indiana* was not in signal distance. He disposes of the testimony of the officers of the prize apparently on the theory that they state that the *Indiana* was in sight, but not in signal distance. But it must be remembered that the *Mangrove's* witnesses say that no other vessel was "in sight." He disposes of the testimony of the officers on the *Indiana* by saying that the *Indiana*, by reason of the sun's position, could see the *Mangrove*, but the *Mangrove* could not see the *Indiana*. But this is a purely conjectural explanation not hinted at in the testimony. It must be remembered also that the issue is whether the *Indiana* could have been called by signal from the *Mangrove*; not whether the *Mangrove* could have read the *Indiana's* signals. He disposes of

the statements of Chaplain Cassard and Chief Yeoman Murry, believing them wilfully untruthful, saying (p.57):

"I have no confidence in the statements of those on board the *Mangrove* that the *Indiana* was so in plain sight at such a short distance, and believe the interest and desire was but the father of the thought and opinion."

But he acknowledges in the extract already quoted that such a conclusion is not satisfactory.

He bases his decision (p. 56) ultimately upon what he considers the undisputed facts shown as to the movements of the vessels. He assumes, without referring to any evidence, that the vessels, having separated between 4.30 and 5, proceeded in directly opposite directions "for nearly an hour." The evidence of the *Indiana's* log (p.35) shows this hour of separation, but, if it shows at all that they were moving directly from each other for "nearly an hour," it shows that the movement continued until six o'clock. Accepting the speed given of the *Indiana*, 10 knots, and the *Mangrove*, 8 knots, they would have been distant in this time 22½ knots or over 25 miles at six o'clock. The argument proves too much. The weakness is that it assumes a direct and continuous movement of the two vessels from each other and makes no allowance for a movement not directly opposite, for changing of courses from lines once begun, or for time taken in making turns by both vessels in their courses. The data are insufficient for a safe basis for the argument. Lieutenant-Commander Everett's testimony is of no value in this connection because he says, producing no log, that the *Indiana* and *Mangrove* parted company "at about 3 or 4 o'clock," a plainly erroneous statement.

The case thus brings itself directly within the rules laid down by this court in early cases as to the allowance of further proof, for we have here (*a*) repeated contradic-

tions of witnesses possibly susceptible of explanation upon full examination and rigid cross-examination of the same and other witnesses and (*b*) an insufficiency of evidence upon the movements of the vessels, a decisive fact in the controversy.

The Inherent Weakness of the Depositions.

Any reading of the depositions forming almost the sole evidence in this case shows their fragmentary nature, due to the unsatisfactory method of taking the testimony. They plainly fail to exhaust the knowledge of the witnesses. Those who can testify to the facts stated must know other material facts. They embrace conclusions without explanation and opinions without disclosure of foundations. The astonishing contradictions of persons of a profession distinguished by a strict regard for veracity have neither been subjected to mutual explanation nor tested by cross-examination.

The Results of Further Proof.

The benefits to be derived from further proof are twofold, (*a*) an explanation of the contradictions already of record and (*b*) the unfolding of additional facts.

What can be produced is indicated by the affidavits filed. Chaplain Cassard denies absolutely the statement of the apothecary that he had said, after the capture, that the *Indiana* was out of signal distance; he adds that Lieutenant-Commander Everett stated to him that his eyesight was defective and that he distinctly heard the mate on the *Mangrove* report that the *Indiana* was coming up and that, at the time, the *Indiana* was clearly discernible. The defectiveness of Lieutenant-Commander Everett's eyesight is a material issue when the controversy is as to the visibility of signals and, if established, will explain the contradictions between his testimony and that of others.

The record itself indicates another field of explanation which ought in the interest of justice to be fully explored. Chaplain Cassard says (p. 39):

"The *Indiana* was within signal distance within three or five miles, and that the prize was between the *Mangrove* and the *Indiana*, the *Mangrove* having passed the prize and turned again towards her."

It is possible that at the very moment when Cadet Palmer and others (pp. 25, 33, 35) looked for vessels and saw only the smoke of the *Indiana*, the *Panama* was between the *Mangrove* and the *Indiana*, and the *Indiana* itself temporarily shut out of sight of the low-lying *Mangrove* by the high hull of the *Panama*. An opportunity for explanation indicated in this way should not be denied.

Additional facts which may serve as instances of those which would be exposed upon further proof are stated by Captain Taylor and Gunner Mallery in their affidavits. They both state that when the boat went from the *Mangrove* after the *Panama*, the actual moment of capture, they saw it in the water. This fact, if established by depositions properly taken, is of the first importance as showing the proximity of the vessels, there being no doubt that signals could be read at a distance where a small boat could be seen in the water. In addition, it negatives the view of the learned district judge that the fact of the *Mangrove* lying low in the water made any difference in her being seen from the *Indiana* or in seeing the *Indiana*.

Captain Taylor states the further fact that, when the *Mangrove* fired and the *Panama* hove to, he distinctly saw the smoke shoot out from the gun and observed the direction of it moving from the mouth of the gun. It can not be said that signals on the *Mangrove* could not have been read from the *Indiana* when the vessels were

near enough for this appearance of the smoke, from as small a gun as those of the *Mangrove*, to have been distinctly seen.

The court being advised of the possibility of explanation of contradictions and of the availability of this testimony, the interests of justice require that the order for further proof should be allowed. Even more insistent is the fact that the very form of the depositions has made them inconclusive.

There Has Been no Culpable Delay.

The decisions cited show that the practice of the court in regard to granting further proof has been one of liberality in furtherance of justice. It has no analogy to the practice in motions for new trials at common law and must not be approached with that in mind.

Why were these depositions not taken before the decree? The responsibility for this is primarily with the captain of the *Indiana* now appearing here on behalf of his officers and men; no one else could take his position in that respect. In his affidavit he makes a full and completely satisfactory explanation of this point, saying that his professional duties kept him closely occupied; that he supposed there was no question in regard to the right of the *Indiana;* that he believed his interests would be cared for by the U. S. District Attorney.

But the ultimate responsibility must rest upon the Navy Department. A circular (No. 89) of that Department is as follows:

"Circular No. 89. NAVY DEPARTMENT,

"WASHINGTON, D. C., *September 10, 1898.*

"Commanding officers are directed to notify all persons under their command that any persons entitled to prize money, bounty, back pay, etc., will have their claims promptly settled by applying directly to the Auditor for the Navy Department, through the Navy Department,

and that the employment of an attorney is entirely unnecessary.

"This Department is informed by the Treasury Department that large numbers of claims are being presented by attorneys in the names of the persons interested. This employment of an attorney does not advance the interests of the claimant in the slightest degree.

"JOHN D. LONG,
"*Secretary.*"

A naval officer is unused to legal procedure and is used to military discipline and subordination. The commanding officer of the *Indiana* was justified in accepting this circular of the Navy Department and in relying on it. It relieved him of his responsibility for looking after the *Indiana's* interest in the prize and placed that responsibility upon the Secretary of the Navy. The Secretary's purpose of benevolence resulted in a failure to present the case of the *Indiana* to the District Court as fully as should have been done. The *Mangrove* actively contending has secured the complete presentation of its case.

It must be remembered also that the relation of the commanding officer of a vessel to the officers and men whom he represents in court in such a proceeding is not the same as that of an attorney and client. The attorney is selected by the client and the client is generally responsible for his acts. Here the commanding officer represents the others interested by the operation of law and official regulation. They should not answer for errors in procedure, if any occurred, when these can be corrected without violation of settled rules.

Conclusion.

It is submitted that the precedents of this court in the time of Chief Justice Marshall fully justify the granting of the motion for further proof.

GEORGE A. & WILLIAM B. KING,
Attorneys for the Indiana.

IV. PROOF OF SERVICE OF MOTION.

IN THE SUPREME COURT OF THE UNITED STATES.

THE UNITED STATES, Appellant, *v.* THE OFFICERS AND CREW OF THE U. S. S. *Mangrove.*	No. 380.
THE OFFICERS AND CREW OF THE U. S. S. *New York*, THE U. S. S. *Indiana* AND THE U. S. S. *Wilmington*, Appellants, *v.* THE OFFICERS AND CREW OF THE U. S. S. *Mangrove.*	No. 433.

To JEFFERSON B. BROWNE,

Attorney for Appellees in the Above-Entitled Causes.

SIR: You will please take notice that we have filed in the above-entitled causes the motion for leave to take further proof, with affidavits and brief in support of said motion which are attached hereto; and that said motion shall be submitted to the court on Monday, the first day of April, 1901, at the hour of twelve o'clock meridian, or as soon thereafter as the same can be heard.

GEORGE A. & WILLIAM B. KING,
Attorneys for Rear-Admiral Henry C. Taylor, Commanding Officer of the U. S. S. Indiana.

Affidavit of Service.

DISTRICT OF COLUMBIA, ss:

William E. Harvey, being duly sworn, deposes and says: That he is an attorney of this court; that on the 9th day of March, 1901, he served a copy of the foregoing notice, to which was attached a copy of the motion,

affidavits and brief therein referred to, by depositing the same in the Post Office at Washington, D. C., by registered mail, the same being addressed to Jefferson B. Browne, attorney for appellees, at Key West, Florida, which this affiant believes to be his post office address; that the registered receipt therefore is attached to this affidavit and made a part hereof.

WILLIAM E. HARVEY.

Sworn to and subscribed before me this 9th day of March, 1901. MARTHA M. BECK,

[SEAL.] *Notary Public.*

[Registry receipt attached.]

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

THE OFFICERS AND ENLISTED MEN OF THE U. S. S. "NEW YORK," "INDIANA," AND "WILMINGTON," APPELLANTS, *v.* THE OFFICERS AND ENLISTED MEN OF THE U. S. S. "MANGROVE."	*No.* 445.

MOTION FOR LEAVE TO TAKE FURTHER PROOFS.

Now comes French E. Chadwick, captain, U. S. Navy, in his own behalf and in behalf of certain appellants herein, namely, the officers and enlisted men who served under him on board the U. S. F. S. "*New York*" on or about April 25, 1898, and moves the Court,

I.

To grant to the parties hereto leave to adduce further proof on the following questions of fact which are at issue in the cause.

1st. Whether the U. S. F. S. "*New York*" participated in the capture of the Spanish steamship "*Panama*" on April 25, 1898?

2d. Whether the U. S. F. S. "*New York*" was at the time of the said capture within signal distance of the U. S. S. "*Mangrove*" or any other vessel or vessels of the United States Navy which took part therein, under such circumstances as to be able to render effective aid if required.

II.

To issue a commission for the purpose of taking the said proofs.

The appellants show that by reason of the exigencies of the naval service they were prevented from adducing full and adequate proofs while the cause was pending before the Prize Commissioners and the District Court of the United States for the Southern District of Florida, in this cause, and that their rights involved in this appeal cannot be properly submitted to the court upon the present record or without further proof upon the material questions of fact above mentioned. In support of this motion the appellants submit the affidavit of French E. Chadwick, captain, U. S. Navy, and pray that this may be considered by the Court in reaching its decision hereon.

JOS. K. McCAMMON,

JAMES H. HAYDEN,

Of Counsel for the Officers and Enlisted Men of the U. S. F. S. "New York," Appellants.

Affidavit in Support of the Motion.

STATE OF RHODE ISLAND, }
City and County of Newport, } ss.:

French E. Chadwick, being duly sworn, deposes and says that he is a captain of the United States Navy, and on April 25, 1898, and at other times during the late war between the United States and Spain, was the commanding officer of the U. S. F. S. *New York*. That about half past five o'clock on the afternoon of April 25, 1898, while the *New York* and other vessels of the North Atlantic fleet, under the command of Rear-Admiral W. T. Sampson, U. S. N., was off Havana, Cuba, blockading that port, the affiant was informed by the officer of the deck that there was a strange steamer to the northeastward. She proved to be the Spanish steamer *Panama* bound from New York to Havana. Thereupon the affiant went up on the after bridge, which was the signal bridge of the *New York*, and looked at the strange steamer through the glass, then informed the Admiral of her approach and proposed standing for her. At this time the U. S. S. *Indiana* was coming toward the *New York* from the direction in which this steamer had been reported; that is to say, from the northeast, and was quite near the *New York*, probably one-half or three-quarters of a mile distant. That the *New York* signalled the *Indiana* asking the character of the vessel. Several signals were exchanged between the *New York* and the *Indiana*, all of which are correctly given in Ensign Mustin's affidavit. The *Indiana* turned around and started at full speed in the strange vessel's direction. Just at this time there was a steamer seen coming out of the port of Havana. The *Indiana* had turned and was proceeding rapidly toward

the strange steamer, and when some distance in her direction, the *Mangrove* was seen to approach the stranger and lay by her at so short a distance from her that there could be no doubt that the two had communicated with one another. This being the case, and the *Indiana* being already so near the *Panama*, the Admiral ordered the *New York* to speak the steamer which had been seen to be coming out of Havana. Thereupon the *New York* stood to the westward. The sun at this time was just about going down. The steamer standing out of Havana was brought to after sunset and found to be a British vessel, bound for Bermuda loaded with refugees. After sending an officer on board, which occupied some time, the steamer was allowed to proceed. Some little time afterwards the *Panama* came within hail of the *New York*, and the officer aboard reported her capture. The *New York* took no part in the actual seizure of the prize, because she had already directed the *Indiana* towards the *Panama* and had noticed the presence of the *Mangrove*. If this had not been the case the *New York* would certainly have effected the seizure herself. The *New York* was undoubtedly in a position to render effective aid in the capture, had it been required. The position of the *Indiana* made any movement on the part of the flagship unnecessary. The *New York* was provided with a large glass mounted on a tripod upon the after bridge. By means of this the affiant was able to make out every detail of the *Panama* for some time before her capture, and as far as her rigging and general character were concerned. The affiant was also able to observe all of the movements of the *Panama*, the *Indiana*, and the *Mangrove*, but could not make out the colors of the *Panama*, because there was very little wind at the time, and such as there was blew from the *Panama* towards the *New York;* so that the

Panama's colors may have been end on. The affiant estimates the distance of the *New York* from the *Panama* and the *Mangrove*, at the time of the capture of the former, at not under 7 miles and not over 10 miles. The affiant could have read the signals at this distance had the wind been such as to blow the signal flags in a direction normal to the line of sight. The question of signal distance is one which is so complicated by varying circumstances that it is impossible to lay down any rule with regard to it. The direction of the wind or the absence of the wind, and the direction of the sun, may render signals unreadable at an extremely short distance, even as little as a half mile.

That to the best of the affiant's recollection and belief there never was any opportunity for officers of the *New York* to appear before prize commissioners. The first call of the *New York* at Key West, after April 25, 1898, was made for the purpose of coaling in order that she might start at once, with a squadron for Porto Rico; that she did not then remain in the harbor of Key West, but was obliged to lie off the reef; that on May 18, 1898, she called at Key West, but every one was busy attending to the coaling of the ship and the organization of a squadron for operations, on the northern and southern coasts of Cuba, intended to head off the Spanish fleet, under the command of Admiral Cervera. The affiant further says that it is impossible that the *Indiana* could have been over six miles distant from the *Mangrove* when the latter approached the *Panama*, and that in his opinion as a naval officer, under no circumstances should the *Indiana*, at least, be excluded from participation in the prize. He is of the opinion that but for the proximity of the heavier and faster ships, the capture would not have been made. He regards this proximity as the cause of

the *Panama's* yielding as she did, as it is hardly conceivable that the *Panama* would not have made an effort to escape from a vessel of so low speed as the *Mangrove*, which, to the best of the affiant's recollection, steamed but eight knots, as a rule, and at the most, nine. As the *Panama* made an average of ten knots on her voyage from New York to the point of capture, as shown by the time of departure and the time of capture, and this for a part of the distance against the strong current of the Gulf stream, she must have been capable of steaming at least eleven knots under conditions of smooth sea and good weather, such as existed at the time of her capture. She thus, in the affiant's opinion, could have easily escaped had the *Mangrove* been the solo vessel at hand.

FRENCH E. CHADWICK.

Sworn to and subscribed before me this 7th day of January, 1901.

[SEAL.] WILLIAM J. COZZENS,
Notary Public.

Notice of Motion.

To JEFFERSON B. BROWNE, Esq.,
Of Counsel for the Appellees:

Take notice that on Monday, April 1, 1901, at the opening of court, or as soon thereafter as counsel can be heard, the foregoing motion will be submitted to the Supreme Court of the United States for the decision of said court thereon.

Annexed hereto is a copy of the affidavit of French E.

Chadwick, U. S. N., and a brief of argument, to be submitted with the said motion in support thereof.

JOS. K. McCAMMON,
JAMES H. HAYDEN,
Of Counsel for the Officers and Enlisted Men of the U. S. F. S. "New York," Appellants.

Proof of Service.

DISTRICT OF COLUMBIA, *ss:*

Geo. W. Dalzell, being duly sworn, deposes and says: That he is above the age of twenty-one years; that on the 8th day of March, 1901, he deposited in the United States mail copies of the foregoing motion, copies of the affidavit and the brief hereunto annexed, in a sealed wrapper duly postpaid, and directed to Jefferson B. Browne, Esquire, of counsel for the appellees, at Key West, Florida.

GEO. W. DALZELL.

Subscribed and sworn to before me this 8th day of March, 1901.

[SEAL.]

L. M. FOX,
Notary Public.

BRIEF IN SUPPORT OF MOTION.

STATEMENT OF THE CASE.

This appeal runs from the decree of distribution entered by the District Court of the United States for the Southern District of Florida, in the case of the United States of America *v.* The Steamship "*Panama*" (p. 59).

The "*Panama*" was a Spanish merchant vessel, and one of the prizes captured during the late war between the United States and Spain. The cause has already been before this Court upon the claimant's appeal from the decree of condemnation, entered by the District Court on May 27, 1898 (p. 18). The decree of condemnation was affirmed on February 20, 1900 (176 *U. S.*, 535–550).

The question at issue on the present appeal is this: Was the U. S. S. "*Mangrove*" the sole captor of the "*Panama*" and entitled to all of the prize money awarded in the case? Or, did the U. S. F. S. "*New York*" and the U. S. S. "*Indiana*" and "*Wilmington*" either participate in the capture, or were they within signal distance of the "*Mangrove*" at the time, and therefore entitled to share in the prize money? (*R. S. U. S. sec.* 4632).

The record, so far as it is pertinent to the present controversy, shows the following state of facts:

The "*Panama*" was captured about twenty miles to the northward of Havana, on the afternoon of April 25, 1898. She was a Spanish mail steamer bound from New York to Havana, and was capable of making about twelve knots an hour. In accordance with her contract with the Spanish Government for this transportation of the mails, she was armed with two breach-loading rifles of 14 cm. calibre, one Maxim automatic gun, and one small yacht gun (p. 20). At the time of the capture, a fleet of armed vessels of the United States Navy consisting, among others, of the U. S. F. S. "*New York*," U. S. S. "*Indiana*," and U. S. S. "*Wilmington*," were lying off Havana, engaged in the blockade of that port. The U. S. S. "*Mangrove*," formerly a light-house tender, was present also. The fleet was under the command of Rear-Admiral W. T. Sampson, U. S. N. All four vessels were under way. The "*New York*," "*Indiana*" and "*Wilmington*" were

steaming to and fro off Havana harbor. About 4.30 o'clock P. M. the "*Mangrove*" having taken on board the mails of the fleet, proceeded toward Key West, at the rate of about eight knots an hour (pp. 34, 56). About an hour later she sighted a strange steamer, which proved to be the "*Panama*," and made for her (p. 24). In about half an hour, the two vessels were close together. From the time when she was first sighted, and throughout the chase, the "*Panama*" held her course southward toward Havana, constantly approaching the "*Mangrove*" and the vessels on the blockade. The "*Panama*" surrendered to the "*Mangrove*" about ten minutes past six. At the moment of capture the "*Panama's*" course was changed to the eastward; but this was not followed for any length of time and had no effect upon her position with respect to the "*New York*," "*Indiana*" and "*Wilmington*." After the capture, an ensign from the "*Mangrove*" was put in charge of the "*Panama*" as prize master with a prize crew drawn from the "*Mangrove*" and "*Indiana*." The "*Mangrove*" then reported to the Admiral and proceeded directly to Key West with the prize.

On April 26, 1898, the commanding officer of the "*Mangrove*" made claim to the prize on behalf of his officers and men. He stated that the capture was made by his vessel alone and that no other vessel of the Navy was then within signal distance of her (pp. 19–20). Similar statements are contained in the report of the prize master (p. 20). Eleven depositions were taken on behalf of the "*Mangrove*" (pp. 21 to 35). These were given during the middle or latter part of May, 1898. Nine of them were verified before the commanding officer of the "*Mangrove*." Two were given before the prize commissioner at Key West. The deponents included the commanding officer of the "*Mangrove*," the ensign who acted as prize master, a naval

cadet, two mates, a boatswain's mate, a quartermaster, an apothecary, a coxswain, a gunner's mate, and an ordinary seaman. All of them declare that no vessel of the Navy assisted the "*Mangrove*" in making the capture, and that there was none within signal distance of her when the "*Panama*" was taken.

On May 21, 1898, Captain F. E. Chadwick, U. S. N., the commanding officer of the "*New York*," on behalf of his officers and men, made claim for a share of the prize money (pp. 48–49). In this it is stated that the capture was made by the "*Mangrove*," assisted by the "*Indiana*," and that the "*New York*" was within signal distance of both and in condition to render them effective aid, if required; that prior to the capture, the rig and smoke-pipe of the "*Panama*" could readily be seen from the "*New York*"; that shortly before the capture, signals were exchanged between the "*New York*" and "*Indiana*"; that the entire chase was seen from the "*New York*," and that she stood ready to take part in it and would have done so had the "*Mangrove*" and "*Indiana*" required assistance. Two depositions were taken on behalf of the "*New York*" during the latter part of May, 1898 (pp. 51–52, 69–70), both deponents being naval cadets. They relate the circumstances of the chase and capture, stating that the "*Mangrove*" was assisted by the "*Indiana*," and that the "*New York*" was within signal distance of both vessels, under circumstances which made her capable of rendering effective aid in the capture had it been required.

On April 26, 1898, Captain H. C. Taylor, U. S. A., the commanding officer of the "*Indiana*" made claim for a share of the prize (p. 35). This states that the "*Indiana*" made for the "*Panama*" some time before she was taken, and was close upon her when she surrendered; that the "*Indiana*" participated in the capture and was within

easy signal distance of the "*Mangrove;*" that she had communicated with the "*New York,*" by signal, about six o'clock, or a few minutes prior to the capture; and that part of the prize crew was taken from the "*Indiana.*" Appended to the claim is an extract from the "*Indiana's*" log for the watch from 4 to 8 o'clock P. M., on April 25, 1898, wherein all the foregoing facts appear (pp. 35–37). Four depositions were taken on behalf of the "*Indiana.*" The deponents were: The chaplain; a lieutenant of the Navy; a first lieutenant of the marine corps, and a chief yeoman. The depositions are very clear and explicit, especially that of the chaplain and chief yeoman, who were on board the "*Mangrove*" at the time and had ample opportunity to observe the circumstances of the capture and to note the close proximity of the "*Indiana*" to the "*Mangrove*" and the "*Panama*" (pp. 37–43).

On June 1, 1898, a claim for a share of the prize was presented to the prize court by Commander C. C. Todd, U. S. N., the commanding officer of the "*Wilmington*" (p. 44). Three depositions were taken on behalf of that vessel. The deponents were: Commander Todd, a lieutenant-commander of the Navy; a lieutenant, and an ensign (pp. 45–48). They declare that the "*Wilmington*" was within signal distance of the "*Mangrove*" at the time of the seizure, and that by preventing the escape of the prize she participated in the capture (pp. 45–48).

In his report to the court the prize commissioner found that the "*Mangrove*" was the sole captor, and that no other vessel of the Navy was within signal distance of her at the time of the capture (p. 52). His report does not set forth any ground for this finding.

The cause was heard by the District Court upon the foregoing record. The district attorney and counsel for the "*Mangrove*" took part in the argument. Adequate

notice of the hearing was not given to the representatives of the "*New York*," "*Indiana*," and "*Wilmington*." On June 15, 1900, the decree of distribution was entered. The court dismissed the claims of the "*New York*," "*Indiana*," and "*Wilmington*"; and found that the "*Mangrove*" was the sole captor, and that she was inferior in force to the "*Panama*." Therefore, the entire proceeds of the prize were decreed to the "*Mangrove's*" officers and men (p. 59). An appeal was taken on behalf of the United States (p. 60). Thereafter this appeal was taken and perfected on behalf of the "*New York*," "*Indiana*," and "*Wilmington*" (pp. 62–64).

ARGUMENT.

The depositions of the nine officers taken on behalf of the "*New York*," "*Indiana*," and "*Wilmington*," and the logs of these vessels for the watch during which the "*Panama*" was captured, are in substantial accord and all are in direct conflict with the eleven depositions of the "*Mangrove's*" officers and men. The court below accepted the "*Mangrove's*" evidence as true and rejected of all of the evidence offered by the other vessels as untrue.

A remarkable discrepancy occurs in the depositions of officers and men who witnessed the capture from the "*Mangrove's*" decks. Chaplain Cassard and Chief Yeoman Murray of the "*Indiana*," who were temporarily absent from their ship and on board the "*Mangrove*," declare positively that the "*Indiana*" was not only within signal distance of the "*Mangrove*," but that the prize was actually within range of her guns (pp. 38–39; 42–43). This would make the "*Indiana*" an actual participant in the capture. On the other hand, the "*Mangrove's*" witnesses declare that they

scanned the horizon with glasses and could only see smoke to the southward. This conflict of evidence brings to mind an ancient saying of admiralty courts, to the effect that every sailor will swear by his ship. Among officers of the navy, however, a higher standard of veracity is to be expected and undoubtedly prevails. The conflict may be explained, in part, by the excitement attending the capture, but there can be no doubt that the main reason of the difficulty lies in the hasty and informal manner in which all of the depositions were taken. The standing interrogatories upon which they were taken are relics of the days of sailing ships and smooth-bore guns. It is not surprising that they should have failed to draw from the witnesses full and complete statements of all the circumstances attending the capture. It cannot be doubted that many of the answers would have been modified and the present uncertainty eliminated from the record if the witnesses had been produced in the manner usual in other causes of admiralty jurisdiction, and had been properly examined and cross-examined.

By the present motion we ask that all parties to this appeal have leave to adduce further proofs to be taken under a commission issued by this court. The affidavit of Captain Chadwick, appended to this motion, and the affidavits of several officers which will be presented to the court, along with a similar motion on behalf of the "*Indiana*," show that officers who, from actual observation, are well qualified to testify, were not produced as witnesses, and that they can give clear and explicit testimony with regard to all of the circumstances under which the capture was made. This evidence would establish the validity of the appellants' claims.

The officers and men of the "*New York*," "*Indiana*," and "*Wilmington*" were not guilty of laches in failing to present

to the prize commissioner depositions of the witnesses whom we now wish to examine. From April 25, 1898, until the close of the war, the "*New York*" and "*Indiana*" were constantly engaged upon the important work of an extensive naval campaign. Their calls at Key West were few in number and brief in duration. At these times their officers and men were always occupied in the coaling of their ships, the securing of supplies, or similar matters demanding immediate attention. The situation of the "*Mangrove*" was very different. She was of little or no value as a fighting ship. She made frequent runs between Havana and Key West, conveying the mails and dispatches of the blockading fleet. When at Key West her officers had ample time to consult counsel and the officials of the prize court, and even when at sea had ample leisure to prepare their depositions with care and deliberation.

It cannot be denied that the proofs which the appellants ask leave to offer, and such further proof as the appellees may see fit to present, will be calculated to remove doubt and give the court a correct knowledge of the facts. It would give the "*New York*," "*Indiana*," and "*Wilmington*" an adequate opportunity to support their claims, which, thus far, they have not had. It would remove the possibility of an unfair distribution of the prize money.

The taking of further proofs would not delay the determination of the case, for it cannot be reached for argument until the next term of this court. Under such circumstances an order for further proofs would be in accordance with the practice of this court, followed in cases where, without fault of the parties concerned, the record discloses a conflict of evidence or a doubt with regard to some material fact.

The "*George*," 1 Wheaton, 408, 409–412.

The "*London Packet*," 2 Wheaton, 372, 373.
The "*Atlanta*," 3 Wheaton, 409, 415–433.
The "*Grotius*," 8 Cranch, 456, 460–462.
The "*Frances*," 8 Cranch, 348, 354.
The "*Adeline*," 9 Cranch, 244, 283–289.
Fry *v.* U. S., 3 Wall, 451.

Necessity for a prompt adjudication and other reasons, which have impelled prize courts to exercise extreme caution, in allowing an enemy or hostile claimant to take further proofs, does not apply to a cause like the one at bar, where condemnation has been decreed, and it only remains for the court to make a just distribution of the proceeds of the prize.

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